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10/748,449	12/30/2003	Richard D. Keeven	1671-0281	2371

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MAGINOT, MOORE & BECK, LLP  
CHASE TOWER  
111 MONUMENT CIRCLE  
SUITE 3250  
INDIANAPOLIS, IN 46204

EXAMINER

REIMERS, ANNETTE R

ART UNIT PAPER NUMBER

3733

DATE MAILED: 11/17/2006

Please find below and/or attached an Office communication concerning this application or proceeding.



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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/748,449  
Filing Date: December 30, 2003  
Appellant(s): KEEVEN ET AL.

**MAILED**  
**NOV 17 2006**  
**GROUP 3700**

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James D. Wood  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed August 23, 2006 appealing from the Office action mailed on March 20, 2006.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The Examiner is not aware of any related appeals, interferences, or judicial proceedings, which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

5,464,406	Ritter et al.	11-1995
2002/0116009	Fraser et al.	08-2002

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 24, 27, 28, 31 and 32 are rejected under 35 U.S.C. 102(b) as being anticipated by Ritter et al. (U.S. Patent Number 5,464,406).

Ritter et al. disclose various embodiments of a system for establishing a prosthetic gap between a femur and a tibia at a knee joint comprising an instrument having a positioning member 30, that defines a femur facing side and a tibia facing side, the positioning member includes a first coupler, 34, including a bore defining an internal groove, 36, and having a guide slot, 32, and a resilient member, 40, and a connector member, 38, having a first mating feature, an augment, 96, having a second coupler, 86, including a pin, 100, that cooperates with the first coupler to fix the augment to the

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positioning member, and a femoral resection guide, 70, having a second mating feature, 78, that mates with the first mating feature of the instrument (see figures 2, 8, 11 and 12). The instrument further includes a handle, 52, extending from the positioning member (see figure 17).

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 25, 26, 29 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ritter et al. (U.S. Patent Number 5,464,406) in view of Fraser et al. (U.S. Patent Publication Number 2002/0116009).

Ritter et al. discloses the claimed invention except the resilient member being an o-ring. Fraser et al. disclose an instrument containing an o-ring as a resilient member (see figures 18-19B and paragraph 0062, lines 9-15). Fraser et al. further shows that the resilient member can be a threaded region or an o-ring, and he teaches that these are functionally equivalent structures (see figures 18-19B and paragraph 0062, lines 9-15). It would have been obvious to one skilled in the art at the time the invention was made to construct the device of Ritter et al. with the resilient member being an o-ring, in view of Fraser et al., as such would merely constitute a substitution of functionally equivalent structures.

**(10) Response to Argument**

Appellant raises a number of issues in his brief, which require rebuttal in this examiner's answer.

Examiner respectfully disagrees with Appellant's argument, regarding claim 24, that the flange, i.e., 34, of Ritter et al. is not a coupler and that the flange does not fix anything to the intramedullary rod. The Merriam Webster ® online definition of couple is "something that joins or links two things together" (attached hereto). A review of figure 8 of the Ritter et al. reference clearly discloses that the flange, i.e., 34, couples/fixes the augment, i.e., 96, to the positioning member, i.e., 30, which is located in the intramedullary canal of the femur, i.e., 27. Examiner also respectfully disagrees with Appellant's arguments regarding claims 27 and 31. Claims 27 and 31 state the first coupler, i.e., 34, of the positioning member, i.e. 30, including a bore (see figure 8) and the second coupler, i.e., 86, of the augment, i.e. 96, including a pin, i.e. 100, that is received within the bore. A review of figure 8 clearly discloses that the pin, i.e., 100, is received in the second coupler, i.e., 86, wherein both the pin, i.e., 100, and the second coupler, i.e., 86, are received in the bore of the positioning member, i.e., 30. Thus, the pin, i.e. 100, is received in the bore of the positioning member, i.e. 30. Appellant is claiming that the pin is received within the bore of the positioning member. Appellant is not claiming that the pin is a coupler or that the pin is in direct contact with the bore of the positioning member. Regarding claim 28, it is noted that appellant did not argue any structural limitations regarding claim 28 and the Ritter et al. reference in Appellant's response to Examiner's first office action. Appellant's response to Examiner's first office

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action concentrated on the method of claim 17, which was withdrawn by a restriction by original presentation. Therefore, this is Examiners first opportunity to address this argument. Examiner respectfully disagrees with Appellant that the system disclosed by Ritter et al. does not have an intramedullary pin. Review of the alternate embodiment of figure 20, discloses an intramedullary pin, i.e., 182, which is received in the guide slot, i.e., 32, of the positioning member, i.e., 30, of the instrument. Regarding claims 25, 26, 29 and 30, the interaction of threads disclosed by the Ritter et al. reference is considered the resilient member. Furthermore, as stated in Frasier et al., which is directed to a medical installation tool, "as shown in FIG. 19B, the proximal opening 406 includes a threaded region 403 which mates to a corresponding threaded region 411 formed on the rod 20.sub.b (FIG. 18). The proximal opening 406 can, however, include a variety of engagement elements such as, for example, an o-ring which mates to a corresponding groove formed on the rod 20.sub.b." Frasier et al. disclose a threaded region in figure 18 and 19B, which can be substituted by an o-ring and a groove formed on the rod.

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**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer. For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



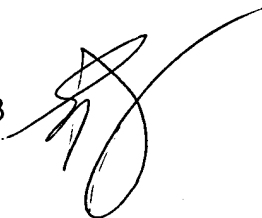
Annette R. Reimers

Examiner Art Unit 3733

Conferees:

Eduardo Robert

SPE Art Unit 3733



Tom Hughes

TQAS Art Unit 3733

